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No. 07-20

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BARR LABORATORIES, INC.,

Petitioner,

v.

MEERA SAMANTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

The questions on which this case turns are simpler than Petitioner maintains:

1. If a plaintiff in a state court action sues a resident and nonresident defendant, asserting properly pled causes of action against both, but fails to serve the resident defendant in a timely manner, may the nonresident defendant, without further grounds, invoke the doctrine of fraudulent joinder in order to remove the case to federal court?

2. If an action is improperly removed, is the jurisdictional defect cured by an entry of judgment by the district court if a nondiverse defendant who has never been served has also never been dismissed from the action?

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INTRODUCTION

Petitioner is asking the Court to deal with a problem that does not exist. It wants the Court to review what should happen if a plaintiff in a state court action sues both a resident and nonresident defendant, but then omits to serve the resident one. According to Petitioner, that can be a ruse to defeat diversity jurisdiction, such that the doctrine of fraudulent joinder should provide a remedy.

There is, however, a simple solution already in place that does not involve invoking that doctrine. In a nutshell, unserved resident defendants against whom no litigation efforts are made in a state action will face dismissal by the state court at an early stage. There is no need for federal courts to involve themselves in that process. Once unserved defendants are dismissed, a case can be removed if the requirements for diversity jurisdiction are then present.

The rule advocated by Petitioner is, moreover, squarely at odds with the settled rule — long ago stated by this Court — that nonservice of a resident defendant cannot, of itself, be the basis for invoking diversity jurisdiction.

Even if this Court were inclined to review the scope of the doctrine of fraudulent joinder, the rather unusual facts now before it suggest that some other case would provide a better "vehicle." This case is a procedurally unusual one whose outcome was built on two misunderstandings. One was the pro se plaintiff's misunderstanding concerning whether the resident defendant had, in fact been served. The other was the district court's misunderstanding of whether a state court summons had even been issued against the resident defendant. That peculiar combination of circumstances — which drove the outcome of the case — may never occur again.

That point aside, Petitioner offers no convincing argument about why fraudulent joinder, in general, is in need of review. Contrary to what it suggests, there is no meaningful Circuit split — certainly not on any issue that would determine the outcome of this case. And although Petitioner talks vaguely about "new and novel" developments in removal jurisprudence that supposedly require new law, it fails to explain what these are and how they feature in the present case.

The other issue raised by Petitioner concerns whether a jurisdictional defect in removal is cured by the subsequent entry of judgment in federal court if a nonresident defendant remains unserved but is never dismissed from the action. Here, Petitioner states that the Ninth Circuit's unpublished decision did not follow a settled decision by this Court. Even if that were so, that would not — in itself — provide a compelling reason for granting certiorari. Moreover, as shown in this brief, the Ninth Circuit's decision was not inconsistent with this Court's previous holdings.

STATEMENT OF THE CASE

1. The parties and the underlying lawsuit

Petitioner Barr Laboratories ("Barr") is a New York-resident corporation. (Barr Appendix ("App.") at 20a.) Respondent Meera Samanta ("Samanta") is a California resident. (*Id.*)

Samanta, as a pro se litigant, filed a California state court action against Barr in which she also named as a defendant Dr. Olina Harwer ("Harwer"). (App. 34a, 36a, 49a.) Harwer is a doctor of medicine who is a resident of California. (App. 36a.)

Samanta pled various causes of action arising out of the death of her daughter. (App. 34a-50a.) She alleged that her daughter's death was caused by a drug prescribed by Harwer and manufactured by Barr. (*Id.*) Barr — referring to the claims against Harwer — acknowledges that Samanta "pled the necessary elements of valid claims against the non-diverse defendant. . . ." (Barr Petition at 7.)

2. The service and nonservice of the defendants

Barr was served in a timely manner and filed an answer. (App. 20a.) A state court summons was issued against Harwer. (App. 30a.) However, it appears that Harwer was not served. (App. 26a.)

Samanta stated subsequently that she had understood that service of Harwer *had* taken place. (*See* Excerpts of Record filed in Ninth Circuit at 82.) She was, apparently, mistaken. That was the first of the two misunderstandings that drove the procedural history of this case.

3. The removal by the nonresident defendant

Before Samanta understood what was taking place, Barr removed the case to federal court on diversity grounds. (App. 19a.) The district court, reviewing the removal sua sponte, issued an order to show cause as to why the case should not be remanded for lack of federal jurisdiction. (App. 67a.)

The district court noted that Barr was not a California resident, but that Harwer was. (App. 67a.) It further noted that Harwer had not been "properly served." (*Id.*) And it then cited authority to the effect that nonservice of a defendant who was joined in good faith was irrelevant and that diversity arises from the citizenship of the parties named and not from the fact of service. (App. 67a-68a.) The order to show cause

concluded: "Although Defendant Dr. Harwer has not been served or responded to the complaint, [s]he remains a named defendant. Removal does not appear appropriate." (App. 68a.)

In response, Barr filed papers arguing why federal jurisdiction was proper. (App. 69a.) The gist of its argument was that the nonservice of Harwer indicated that Samanta had no intention to proceed against that defendant, such that removal was warranted under the doctrine of "fraudulent joinder." (App. 69a-75a.) Samanta — who remained pro se — did not file an opposition at that point.

4. The district court's clearly erroneous finding that no summons had been issued against the resident defendant

After reviewing Barr's papers, the district court vacated its order to show cause, finding that the removal was proper. (App. 10a.) However, the reason that it gave was that no state or district court summons had been issued against Harwer. (*Id.*)

That was clearly erroneous. Barr itself had indicated in its papers that a state court summons *had* been issued against the doctor. (App. 74a.) Indeed, a copy of that summons is included in Barr's Appendix to its petition now before this Court. (App. 30a.) Barr's point was merely that *service* had not been carried out.

That was the second of the misunderstandings that led to this case proceeding in federal court. Unfortunately, Barr did not act to correct the district court's mistake.

5. Plaintiff's unsuccessful effort to have the case remanded

Later in the district court proceedings, Samanta filed papers asking for the case to be remanded to state court. (*See* Excerpts of Record filed in Ninth Circuit at 81 et seq.) In these, she stated that Harwer had been joined in good faith, that she understood the doctor to have been served, and that it was a "misrepresentation" to say that there was really no lawsuit filed against the doctor. (*Id.*)

The district court refused to remand the case. (App. 8a-9a.) This refusal was stated in an order that also granted a motion for summary judgment brought by Barr. (App. 7a-9a.)

6. The appeal to the Ninth Circuit

Samanta appealed. The Ninth Circuit reversed on jurisdictional grounds, stating — in an unpublished memorandum decision — that the district court had applied an incorrect test with respect to fraudulent joinder. (App. 2a-4a.) The Ninth Circuit explained that the correct test — treating "fraudulent joinder" as a "term of art" — focuses on whether a plaintiff states a cause of action against a resident defendant. (App. 3a, citing to *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).)

While the Ninth Circuit appeal was underway, the California Superior Court — from which the case was removed — held a hearing to review the status of the case while the arguments concerning jurisdiction were being resolved in federal court. The parties who were represented by counsel at that hearing included not only Barr and Samanta, but also Harwer. (*See* Samanta's Request for Judicial Notice filed with the Ninth Circuit on August 3, 2005.) However, that fact was not referenced in the Ninth Circuit's decision. (App. 2a-4a.) Indeed, the Ninth Circuit did not rule on the Request for Judicial Notice that drew this to its attention. (*Id.*)

REASONS FOR DENYING THE PETITION

A. This Is A Procedurally Unusual Case That Would Not Present A Good Vehicle For Reviewing Fraudulent Joinder, Even If Review Of That Doctrine Were Needed

Even if this Court were to want to review the doctrine of fraudulent joinder, this case would not offer a good "vehicle" for that purpose. The case developed in the way that it did because of two misunderstandings (neither of which are acknowledged in Barr's discussion of the case, even though the existence of both is shown in the record). One was Samanta's misunderstanding about whether Harwer had been served. The other was the district court's misunderstanding about whether a state court summons had been issued against Harwer.

Together, these misunderstandings led to a very peculiar and messy set of circumstances, which are unlikely to be repeated. The cases cited by Barr show that issues related to fraudulent joinder do arise from time to time in the Circuit Courts of Appeals. Other cases would present better vehicles for a review of this area — if, indeed, any review were needed.

B. Existing Law Provides Methods Of Dealing With Unserved Resident Defendants Without Invoking Fraudulent Joinder

(i) Petitioner is asking this Court to deal with a problem that does not exist

Quite apart from the fact that this case would not be a suitable vehicle for a review of fraudulent joinder in general, Barr fails to show why such a review is needed.

The gist of Barr's argument is that a showing of "intent not to proceed" should suffice for the doctrine to be invoked because, otherwise, it would be too easy for a plaintiff to plead a cause of action against a resident defendant simply in order to avoid diversity jurisdiction. Barr's case relies on the assumption that an "intent not to proceed" can be inferred from a failure to serve a resident defendant in a timely manner — because, in the present case, there was absolutely nothing else from which an intent not to proceed could possibly be inferred.

Barr's theory is badly flawed. As shown below, it overlooks the fact that if a plaintiff does not prosecute an action against a resident defendant even by effecting service, the state court will simply dismiss the action relatively early on. Diversity jurisdiction will then arise. Thus, there is *no need* to turn to a federal court to get rid of a "spoiler" defendant. Barr is asking this Court to fashion a judicial remedy to address a problem that does not exist.

(ii) Once the unserved resident defendant has been dismissed by the state court, diversity jurisdiction would at that point arise

If the dismissal of an unserved defendant means that only nonresident defendants remain, then diversity jurisdiction will, *at that point*, be invoked. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 69-69 (1996). This is because an exception to the rule of testing removal by reference to the "state of things" at the outset is that diversity may be established through the dismissal of a resident defendant at any time prior to judgment. *Id.*

What this means is that a nonresident defendant who is skeptical about whether a plaintiff actually plans to proceed against any unserved resident defendants should take those

concerns to the state court in the first instance. If the state court dismisses the action against those defendants, the nonresident defendant can then obtain the desired federal jurisdiction.

(iii) The issue of whether to dismiss Harwer as an unserved defendant would have come before the California Superior Court at a Case Management Conference

In California, at least, dismissal in state court actions does not happen automatically through the passage of time, even if service does not take place by a prescribed limit. Rather, it requires an order by the Superior Court (the trial court). Such an order was never made with respect to Harwer.

The time at which such an order would generally be made is at a Case Management Conference. California Rule of Court 3.728(8) provides for the Case Management Conference Order to include "the dismissal or severance of unserved or not-appearing defendants from the action." However, in this case, Barr swooped and removed the case *before* a Case Management Conference had occurred. (App. 81a.)

Barr should have exercised more patience. In fact, it would not have had to wait long. The record shows that a Case Management Conference was scheduled for March 23, 2004. (App. 28a.) The notice of removal was dated March 4, 2004. (App. 25a.) That was less than three weeks before the Case Management Conference would have provided an opportunity for Barr to have requested Harwer's dismissal.

Even if there had been a Case Management Conference, the dismissal of Harwer would not have been mandatory if there were good cause to allow more time. Under California

law, the decision as to when to dismiss an unserved defendant is in the trial court's discretion. *Terzian v. County of Ventura*, 24 Cal.App.4th 78, 83 (1994). Thus, if the state court had found that Samanta had been honestly mistaken as to the fact of service, more time could have been allowed for her to do that which she had understood had already been done.

(iv) Whatever "new and novel" schemes may exist to defeat federal jurisdiction, they do not feature in this case

Barr's Petition states: "Increasingly, plaintiffs are employing new and novel strategies to frustrate defendants' legitimate rights to remove actions to federal court." (Barr Petition at 6.)

Barr does not explain what these "new and novel" strategies are, but they are surely nothing that features in the fact pattern of this case. Even if one were to assume that Samanta were involved in a scheme to evade federal jurisdiction (and no such concession is made), the chosen method would hardly be "novel." A plan to leave Harwer unserved would simply be rather ill-thought-out, futile, and ineffective — as it would lead, before long, to a dismissal, which would defeat the purpose. The intervention of this Court is hardly needed to deal with that.

So if there are these unspecified "new and novel" tricks out there that need to be reined in, it would make sense to review them by granting certiorari with respect to a case whose facts are on point. This is no such case.

C. The Rule Advocated By Petitioner Would Be Impractical And Would Violate State Sovereignty

(i) A state court is much better placed than a federal district court to determine the intent of a plaintiff before it

The removal scheme allows a defendant to remove a case merely by filing a notice of removal. 28 U.S.C. § 1446. No motion or hearing is necessary in the state court from which the case is removed (or, for that matter, in the federal court to which it is removed). *Id.*

Rather, the removal is effective as soon as the defendant files a proper notice of removal that meets the requirements of the statute. 28 U.S.C. § 1446(d). After a case is removed, the state court may no longer rule on any matter in the case. *Mitchum v. Foster*, 407 U.S. 225, 234 n.12 (1972).

All of this is a very invasive procedure. *U.S. ex. rel. Walker v. Gunn*, 511 F.2d 1024, 1027 (9th Cir. 1975). Removal is performed in "derogation of state sovereignty." *Id.*

When it comes to deciding whether a plaintiff has a bona fide intention to proceed against a resident defendant against whom a facially valid cause of action has been pled, there may be a myriad of issues known to and understood by the trial judge in the state court, but not a district court.

There may be perfectly acceptable reasons why a defendant has not been served. The trial judge who has been handling that matter in state court is far better placed to make that call than a district court judge who sees the case land on the federal docket out of the blue.

Hence, the rule advocated by Barr is not only unnecessary, it is also impractical.

(ii) Federalism concerns call for strict construction of the removal process

Due to the invasiveness of the removal process, federal courts have long recognized that it raises significant federalism questions. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941) (recognizing federalism concerns inherent in the removal process).

These concerns have led to a strict construal of removal statutes, lest, through judicial laxity, the proper powers of the states might be invaded. *Healy v. Ratta*, 292 U.S. 263, 270 (1934); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. at 108-109.

(iii) A finding that removal was proper in this case would violate established principles of federalism

If what took place in the present case at the trial court level were found to be a proper method of establishing diversity jurisdiction based on removal, a rule of law would be created that any nonresident defendant, unhappy at the pace of proceedings in state court against a resident defendant, could file a notice of removal and, in essence, ask the district court to second-guess whether the state court had acted sufficiently quickly to dismiss unserved defendants.

Such a rule would not only impose a burden on overworked district courts, in making them the overseers of their state court counterparts, but it would also intrude on the rights of state courts to manage their own affairs. It would stretch the removal statute and thus contravene this Court's mandate calling for strict construal.

Moreover, if one accepted that nonservice could be grounds for removal on this basis, then, logically, there would be no reason why other indicators suggesting a "lack of intent

to proceed" could not also be used — tardiness in discovery, for example.

There is no reason even to entertain such a novel theory of removal by granting the Petition now before the Court.

D. This Court's Prior Holdings Do Not Require A Decision Different From The One Reached In This Case By The Ninth Circuit

(i) Petitioner appears confused as to whether new law needs to be fashioned in order to produce the result it wants

Barr appears unclear whether it is asking the Court to fashion new rules or whether it is simply asking the Court to restate and apply the existing doctrine of fraudulent joinder. On the one hand, Barr writes: "Existing precedent from this Court does not fully address the complex and myriad issues arising in lawsuits around the country that are removed to federal court today." (Barr Petition at 6.) This suggests that — in Barr's opinion — new law needs to be fashioned.

On the other hand, Barr relies on *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921), in an effort to position the rule that it advocates as consistent with this Court's prior decisions. (Barr Petition at 6-7.)

Thus, one is left wondering whether all that Barr actually seeks is the correction of what it sees as an erroneous, unpublished Ninth Circuit case, or whether it wants new law to be carved out that would work more beneficially for it on this rather peculiar set of facts.

(ii) *Wilson v. Republic Iron & Steel Co.* does not support Petitioner's position

In any event, Barr's reliance on *Wilson v. Republic Iron & Steel Co.* is misplaced. Contrary to what Barr suggests, that case does not mandate an outcome in the present case different from the one reached by the Ninth Circuit.

In *Wilson*, this Court found that a party "was joined as a defendant without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the employer's right of removal." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. at 98. Based on this, Barr argues that "intent to proceed" has been the proper test all along but has been overlooked at the Ninth Circuit and in various other Circuits.

However, Barr overlooks the fact that in *Wilson*, the Court found that the causes of action against the resident and nonresident defendants were *separable* and that the resident defendant was "not in any degree whatsoever responsible" for the injuries suffered. *Wilson v. Republic Iron & Steel Co.*, 257 U.S. at 94.

Here, Barr has *not* contended that the causes of action in the state court complaint against it and Harwer were legally separable. Moreover, it is plain that they are *not* separable.

Claims are not separate and independent of each other for the purpose of diversity jurisdiction if they grow out of a single actionable wrong for which a single recovery could be obtained no matter how many defendants shared liability. *Clarence E. Morris, Inc. v. Vitek*, 412 F.2d 1174, 1176 (9th Cir. 1969).

Here, the actionable wrong that was alleged was the prescribing by Harwer of a drug manufactured by Barr that

caused the death of Samanta's daughter. The claims against Barr for strict liability and negligence, and those against Harwer for negligence, are intertwined. There is a single injury arising out of the alleged actions, for which liability, if proven, would be shared by the two defendants.

Moreover, this Court — commenting on *Wilson* — has explained that what was present there amounted to proof of *actual fraud*. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 190 (1931) ("The facts disclosed in this record fall far short of proof of actual fraud such as was held sufficient to justify removal in . . . *Wilson v. Republic Iron Co.*"). In the present case, there is no suggestion that Samanta engaged in anything that could be called "actual fraud."

The Court in *Mecom* also endorsed "the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined." *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. at 190. This rule puts the emphasis not on what is going on in the mind of the plaintiff, but on the cause of action asserted against the resident defendant. And that is broadly consistent with the test applied by the Ninth Circuit.

(iii) *Wecker v. National Enameling & Stamping Co.* does not support Petitioner's position

Samanta acknowledges that some cases have allowed the district court to pierce the pleadings in deciding whether it has jurisdiction under the doctrine of fraudulent joinder. However, such instances are limited to a strictly circumscribed inquiry involving uncontroverted summary evidence that establishes unmistakably that a diversity-defeating defendant cannot possibly be liable to a plaintiff under applicable state law. The focus is kept on the cause of action, not on the intent of the plaintiff.

That was the nature of the inquiry in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1907), a case cited by Barr. *Wecker* involved a suit for injuries sustained due to a machine that allegedly was defectively designed. *Id.* at 178. The Court held that a non-diverse defendant was fraudulently joined where uncontradicted affidavits showed that the defendant was merely a draftsman with no responsibility for designing the machine at issue. *Id.* at 183-85.

The type of inquiry conducted in *Wecker* does not involve putting the focus on the subjective intent of the plaintiff. Applying the *Wecker* test to the facts of the present case would make no difference to the outcome. For it to result in a different outcome, there would have had to have been an evidentiary showing along the lines that "Harwer never prescribed Barr's drugs to Samanta's daughter." No such showing was even attempted (nor, for that matter, could it have been, given the undisputed facts of the case).

The *Wecker* test is really just an expanded version of the rule applied by the Ninth Circuit in the present case. It is not inconsistent. The Ninth Circuit said that the test focuses on whether a plaintiff states a cause of action against a resident defendant. (App. 3a, citing to *McCabe v. General Foods Corp.*, 811 F.2d at 1339 (9th Cir. 1987).) *Wecker* also focuses on whether there is a cause of action — only it allows the inquiry to go outside the pleadings to look at uncontroverted evidence relating to whether the cause of action is sustainable.

In the present case, Barr did not offer any extrinsic evidence related to the sustainability of the causes of action against Harwer. That is why it was not necessary for the Ninth Circuit to have engaged in an inquiry to pierce the pleadings. However, the Ninth Circuit has in its fraudulent-joinder case law allowed for a *Wecker*-style inquiry going beyond the

pleadings where suitable evidence *is* offered. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Thus, there is no reason to believe that the Ninth Circuit has drifted away from *Wecker*.

(iv) Even if "intent" were relevant, this Court has held that the fact of nonservice cannot justify removal

Even if "intent" were the test — or part of it — a removing defendant would need to come up with something different from the fact of nonservice in order to prove it. A case decided by this Court some years after *Wecker* and *Wilson* states that where a nonseparable controversy involves a resident defendant, "the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant." *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939). It goes on: "[T]he non-resident defendant should not be permitted to seize an opportunity to remove the cause before service upon the resident co-defendant is effected. It is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove." *Id.*

The *Pullman* opinion indicated that the Court had in mind circumstances where fraudulent joinder was *not* an issue. *Pullman Co. v. Jenkins*, 305 U.S. at 541. The only way in which one can lend meaning to that qualification is to recognize that fraudulent joinder cannot be inferred by nonservice. In other words, if a cause of action had *not* been established against a resident defendant, then the fact of nonservice *could* then be relevant in finding the joinder to be fraudulent. But where such a cause *has* been established, nonservice becomes *irrelevant*.

What this means is that even if "intent not to proceed" were a relevant inquiry in the fraudulent joinder analysis, such intent could not be inferred from the fact of nonservice. There would have to be something else.

Indeed, in one district court published case relied on heavily by Barr in the proceedings below, and mentioned in its Petition, the plaintiff's lack of intent with regard to unserved defendants was shown not by nonservice, per se, but by an express written statement that he did not want to proceed. *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F.Supp. 845 (C.D. Cal. 1955). In *Herzig*, plaintiff's counsel had made a written representation to the court that no more defendants — including those needed to defeat diversity — would be served. *Id.* at 847.

Furthermore, the district court in *Herzig* noted that the plaintiff had stated that he wished to dismiss the action against all the defendants except for the nonresident one, such "that the only real controversy at the time of the filing of the petition for removal, and presently existing, is between the plaintiff, a resident of California, and the [nonresident] defendant. . . ." *Herzig v. Twentieth Century-Fox Film Corp.*, 129 F.Supp. at 848.

E. There Is No Circuit Split On The Issue On Which This Case Turns

(i) Semantic variations do not amount to a Circuit split

Barr suggests that the Circuits are split on what the fraudulent joinder doctrine entails. (Barr Petition at 14.) However, the differences amount to little more than semantics — and certainly do not entail issues dispositive to this case.

Barr refers to cases across the Circuits that use language such as "no possibility of recovery," "no reasonable basis,"

"no reasonable possibility," or "no colorable claim." However, these all essentially say much the same thing. They put the focus on the cause of action and ask whether it is viable. Barr is trying to conjure up a Circuit split out of linguistic variations that do not reveal any substantive division.

Significantly, the Fifth Circuit in *Travis v. Irby*, 326 F.3d 644 (5th Cir. 2003) — a case that Barr highlights as containing "an in-depth discussion of the various mutations of the fraudulent joinder standard throughout the circuits" (Barr Petition at 14) — does not reach a conclusion that there is a meaningful Circuit split. It seems to treat the different language as gelling into the same overall rule. For example, it comments when referring to the discussion in *Moore's Federal Practice*: "Although these tests appear dissimilar, "absolutely no possibility" vs. "reasonable basis," we must assume that they are meant to be equivalent because each is presented as a restatement of the other." *Travis v. Irby*, 326 F.3d at 647, citing to 16 *Moore's Federal Practice* § 107.14[2][c][iv][A].

However, regardless of whether there is any substantive difference in the language that is used in different Circuits about the sustainability of claims against resident defendants, this does not have a bearing on the present case. This is because Barr has already *conceded* that Samanta's causes of action against Harwer were properly pled (Barr Petition at 7), and it did *not* offer extrinsic evidence that cast doubt on whether she would be able to prove the necessary elements. Barr's *only* extrinsic evidence was the fact of nonservice — which, as shown above, does not suffice as the basis for removal.

(ii) Barr has not shown that any of the Circuits reject the use of extrinsic evidence to pierce the veil

Likewise, Barr fails in its attempt to characterize the Circuits as having drifted away from this Court's standard in *Wecker*. Significantly, Barr has not cited a single case that rejects the use of any type of extrinsic evidence to prove whether there is a sustainable cause of action. As pointed out earlier, the Ninth Circuit — whose decision in the present case Barr criticizes — *does* allow such evidence to be considered when (unlike in the present case) it is presented. *Ritchey v. Upjohn Drug Co.*, 139 F.3d at 1318. So this is not an instance of the Ninth Circuit — or any other Circuit — being out on a limb.

(iii) Barr has not shown that any of the Circuits have adopted its "intent test"

Nor has Barr managed to show that there is a Circuit split on whether there is an alternative "intent" test. Of the cases cited in its effort to identify a Circuit split, only one — *In re Briscoe*, 448 F.3d 201 (3rd Cir. 2006) — is identified by Barr as referring to "intent." However, that case was decided on grounds that had nothing to do with "intent." There, a district court found that claims in a class action against certain non-diverse defendants were time-barred. *Id.* at 206. That is a classic case of the mainstream test, with its focus on the cause of action.

The passing references in the Third Circuit's opinion in *Briscoe* to "intent" were, at most, dictum. *In re Briscoe*, 448 F.3d at 216-217. Moreover, one of them was followed immediately by the qualification: "But, if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper

and remand the case to state court. . . ." *Id.* at 217, citation omitted. So the emphasis is placed squarely on the cause of action, as it should be.

In short, far from there being a Circuit split on the issue of "intent," there is no proper authority from *any* of the Circuits that the test advocated by Barr is the correct one.

F. The Jurisdictional Defect Was Not Cured By The Time The District Court Entered Judgment

Barr also argues that "even if [it] had removed the action prematurely," the fact that Harwer was not served before judgment was entered by the district court meant that any jurisdictional defect was cured. (Barr Petition at 23-25.) Barr relies in this part of its argument principally on *Caterpillar Inc. v. Lewis*, 519 U.S. 61.

As a preliminary observation, all that Barr is doing here is advancing its argument about why this unpublished case was wrongly decided. Barr makes no argument for granting review on this issue beyond the fact that it disputes the result in the appeal that it lost. That is not a compelling argument for granting its Petition. *Watt v. Alaska*, 451 U.S. 259, 275, fn.5 (1981) (Stevens, J., concurring) ("The possibility that a lower court may have incorrectly decided a federal question is, of course, a relevant factor when this Court decides whether to exercise its discretionary certiorari jurisdiction. However . . . our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases. . . .").

That said, Barr is anyway mistaken in its view of whether there was error. First, it is important to note that purportedly "sham" parties are not automatically eliminated from a suit after removal under the doctrine of fraudulent joinder. They

remain part of the action until or unless dismissed by the district court. *See, e.g., Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 872 (5th Cir. 1991) (motion to dismiss properly brought against nonremoving defendants who remained parties).

Thus, when the case was removed, Harwer remained a party. Indeed, the case — once in federal court — continued to be captioned "Samanta v. Harwer, et al." (*See, e.g.*, App. 5a.) And there is nothing in the record that indicates that Harwer was ever dismissed by the district court. The jurisdictional defect that was present at the outset remained throughout. Under the holding of *Caterpillar*, if, at the end of the day and case, a jurisdictional defect relating to diversity remains uncured, the judgment *must* be vacated. *Caterpillar Inc. v. Lewis*, 519 U.S. at 76-77.

In *Caterpillar*, the Court found that the jurisdictional defect *was* cured under the facts of that case. *Caterpillar Inc. v. Lewis*, 519 U.S. at 73. However, those facts were very different from the ones in the present case. *Caterpillar* deals with a situation where a plaintiff — after removal — voluntarily and affirmatively released the remaining resident defendant from the lawsuit through settlement, thereby creating diversity. *Id.* at 65-66. Here, Samanta has never taken such an affirmative step — she has never resolved her differences with Harwer in the court system and there is nothing in the record indicating that she has done so elsewhere. Her papers filed with the California state court, the district court, the Ninth Circuit, and this Court indicate her wish to continue to litigate her claim against Harwer.

Samanta acknowledges that the holding in *Caterpillar* is not restricted to a situation in which a resident defendant is released though settlement. The Court held, more generally, that "a district court's error in failing to remand a case

improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar Inc. v. Lewis*, 519 U.S. at 64. However, *Caterpillar* could only apply if there were a jurisdictional defect at the point of removal and something subsequently happened that cured it. The fact is that *nothing* did happen in this case. This is because Harwer was never dismissed as a party. Whatever her status was at the point of removal has remained the same ever since.

Moreover, there is nothing in *Caterpillar* that imposes on a plaintiff the obligation that Barr contends exists in order to preserve appellate rights. It is one thing to say that if a plaintiff releases the only resident defendant after removal, there is no longer a jurisdictional problem and the case should just move on. But it goes beyond *Caterpillar* to say that a plaintiff in Samanta's position must affirmatively litigate against the resident defendant in federal court in order to be able to appeal the fact that the case was in federal court at all — even though that same federal court has already declared the resident defendant to be a "sham."

In other words, it would be a confounding directive if, having been told that the case is being removed to federal court because the resident defendant is a "sham," the plaintiff is then told that she does not have grounds to appeal that decision because that same resident defendant has not been served with federal process.

As to why Harwer was not served with the state court summons once removal had taken place, the answer is surely obvious. The state court had lost jurisdiction of the case. Thus, its summons could not have had any force or effect from then on. For Samanta to have tried to pursue Harwer in state court at that point would have conceded the issue — it

would have meant treating the action against Harwer as separate from the one against Barr.

G. Dismissal Of The Resident Defendant By The Ninth Circuit Would Have Been Improper Because She Is Not A Dispensable Party

The fact that Harwer was not dismissed is much more than a "housekeeping issue," as Barr calls it. (Barr Petition at 27.) Barr argues that the Ninth Circuit should simply have dismissed Harwer as part of its appellate review. (*Id.*) It cites to *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). Actually, what the Court said in that case was that "a court of appeals *may* grant a motion to dismiss a *dispensable* party whose presence spoils statutory diversity jurisdiction." *Id.* at 827 (emphasis added).

First, the Court talked about "may," not "must." Second, this argument brings one back to the point about Samanta's claims against the two defendants not being separable. Harwer is not a "dispensable" party, because the claims against her and Barr are closely intertwined such that the state court complaint sought a joint judgment against both of them. Separating Harwer would mean that complete relief could not be granted as between the other parties and there would, moreover, be the risk of inconsistent obligations. (*See* Fed. R. Civ. P. 19.)

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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